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Contributory Negligence--The Dwindling Defense

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action the defendant claimed that Section 271 (d) now abrogated this finding. The court properly held that this section did not change the law with regard to patent misuse in violation of the anti-trust laws, and regardless of what change may have been effected, the defendant was not otherwise entitled to relief under the meaning of Section 271 (d).

> Can it be possible that Congress intended, by paragraph (d), to give a patentee a protection superior to the broad public policy of the Sherman Act . . . ?[35]

Conclusion

There has been no decision by the United States Supreme Court as to whether or not Section 271 has changed the doctrine of the *Mercoid* case, and few of the lower courts have squarely faced the problem. Those courts that have so faced this problem have taken the words to indicate clearly the intention of Congress to overrule the holding and dicta of the *Mercoid* case, in so far as this section applies. In view of the wording of this section and the few cases decided so far, there is little doubt that the courts will continue to construe this section as overruling the *Mercoid* decision that filing a suit is patent misuse. In regard to furnishing a component that is not a staple of commerce suitable for a non-infringing use, the lower courts and the Supreme Court will undoubtedly follow the few courts that have held this action to be contributory infringement. This is the import and natural construction of Section 271.

William N. Hogg

Contributory Negligence—The Dwindling Defense

Jones is driving north on Broad Street. As he comes to Main Street, he pulls into the left lane, prepares to turn left, and as he is turning sees an automobile driving south bearing down on him at sixty-five to seventy miles an hour. Before he can complete his turn, the oncoming car, now with its brakes on, skids into the side of Jones' car.

Subsequently a passenger in the other vehicle brings suit against Jones for injuries sustained in the accident, the theory being that he was negligent in turning left without ascertaining whether the way was clear. When the deposition of the plaintiff-passenger is taken, it turns out that she saw Jones' vehicle turning left, but said nothing to the driver, even though her driver was not slowing down. Further, she testifies that she knew the speed limit was thirty-five miles per hour on that road and that the driver had been traveling at this high

35. 134 F. Supp. 69, 72 (D.D.C. 1955).

rate of speed for over a mile, but she had said nothing by way of protest. Upon learning of this, it seems to Jones that part of the "fault" for the accident rests with the plaintiff-passenger; therefore he asks his attorney what "the law" is in this respect.[1] It is the purpose of this note to examine the duty devolving upon such a passenger in Ohio.

A Passenger Must Use Ordinary Care

A statement of the rule concerning passengers, unobjectionable in any quarters, is that:

> It is the duty of a guest or private passenger in another's automobile . . . to exercise ordinary care to guard himself against injury from the hazards of the road.[2]
>
> A guest or passenger in an automobile may rely to a reasonable extent on the exercise of due care by the driver. . . .[3]

The problem of what constitutes "ordinary care," an enigma throughout tort law, becomes especially difficult in cases involving automobile passengers.

In any discussion of the defense of contributory negligence consideration must be given to the type of conduct which fulfills ". . . the duty . . . to exercise ordinary care. . . ." Investigation of the cases involving the use of this defense discloses a growing reluctance on the part of the courts to submit the defense to the jury, the justification being that there was no duty on the part of the passenger to act under the circumstances.[4] The net effect is that in many cases the defense of contributory negligence is completely removed from the case, when such a result would not be obvious to many attorneys.

In cases where a car suddenly swerves over the center line, or suddenly pulls out from a side street, colliding with the carefully driven car in which the plaintiff was a passenger, most courts and writers are in agreement that there is no question of contributory negligence to go to the jury, since the accident could not have been avoided by a warning on the part of the passenger.[5] This view seems entirely justifiable.

However, in a situation where the conduct of plaintiff's driver could have been a factor in causing the accident, the decision that there was no contributory negligence on the part of the passenger in

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1. Although this is a hypothetical fact situation, it is one not uncommon to cases involving the doctrine of contributory negligence.

2. 4 Blashfield, Cyclopedia of Automobile Law and Practice pt. 1, § 2391, at 515 (1946).

3. *Id.* § 2392, at 527.

4. There is no duty in this situation, as opposed to other elements of negligence not being present, such as proximate cause or damage.

5. Golamb v. Layton, 154 Ohio St. 305, 95 N.E.2d 681 (1950); *accord,* McCrate v. Morgan Packing Co., 117 F.2d 702 (6th Cir. 1941).

not protesting against the conduct is less justifiable. In one such case the trial court held that, although the driver exceeded the speed limit, there was no issue of contributory negligence for the jury, and the decision was sustained on appeal.[6] The appellate court cited with approval *Cleveland Ry. v. Heller*,[7] which held that an occupant had no duty to keep remonstrating or instructing the driver how the vehicle should be operated. Therefore, the fact that the plaintiff remained silent, even though the driver was exceeding the speed limit, was no evidence of contributory negligence.

A narrowing of the passenger's duty is also found in the case of *Bush v. Harvey Transfer Co.*[8] In that case a fuse had blown on the defendant's truck, causing the lights to go out. The driver pulled over to the side of the road, put a fuzee on the rear of the truck, and was getting out his pot torches when the collision occurred. A trucker traveling in the opposite direction, realizing the plight of the defendant's driver, pulled his truck to the side of the road. Seeing a car approaching the point where the defendant had pulled off the road, the second trucker grabbed his flashlight, ran to the center of the highway, and tried to wave down the approaching car in which plaintiff's decedent was a passenger. The trucker also yelled as the car passed. A few seconds later the collision occurred, killing the plaintiff's decedent. The trial court submitted the issue of contributory negligence to the jury, which returned a verdict for the defendant. The Supreme Court, however, held that since there was no evidence that the plaintiff saw the warning signals or heard the trucker's cries, there was no evidence of contributory negligence merely because the plaintiff did not speak, for, in the words of the court, "there was no evidence of circumstances which would impose any duty to do so."[9] The court went on to point out that the passenger had a right to rely upon the driver to operate the vehicle properly, and, until the passenger *had knowledge* of some unusual circumstance, he had no duty to act.[10]

A similar result was reached in the case of *Davis v. New York Central R. R.*[11] In this case Davis, the decedent, was riding in a pick-up truck driven by her husband. The fatal accident occurred when the truck was hit by defendant's train as the truck crossed the third of a four-track graded crossing. Evidence of objects and weeds obstructing the view from the pick-up truck to the *left* as it crossed

6. Telling Belle Vernon Co. v. Krenz, 34 Ohio App. 499, 171 N.E. 357 (1928), *motion to certify denied*, Jan. 23, 1929. The court mistakenly talked about joint enterprise and contributory negligence in the same breath, saying that since there was no joint enterprise merely because plaintiff was the wife of the driver, there could be no contributory negligence.

7. 15 Ohio App. 346 (1921), *motion to certify denied*, Feb. 7, 1922.

8. 146 Ohio St. 657, 67 N.E.2d 851 (1946).

9. *Id.* at 671-72, 67 N.E.2d at 859.

10. *Id.* at 670-71, 67 N.E.2d at 858.

11. 104 Ohio App. 497, 150 N.E.2d 477 (1957), *motion to certify denied*, June 19, 1957.

the track was admitted, even though the train approached from the *right*. It was alleged that this crossing was one of more than ordinary danger, one factor being that the tracks curved to the right, so that the railroad should have had extra warning devices. It should be noted that the decedent in this case lived only six hundred feet from the crossing and traversed this same path quite frequently. The trial court submitted to the jury the question of contributory negligence on the part of the decedent. The jury returned a verdict for the plaintiff. The appellate court, in affirming this decision, said "we have difficulty in finding any evidence upon which contributory negligence is suggested."[12] The court also approved a special charge requested by the plaintiff that, "ordinarily, it is not the province or even proper for a guest to interfere with the driver until she discovers that the driver is unskillful, reckless, or has failed to perceive impending danger."[13]

The contrary view of what constitutes the duty of the passenger is found in the dissenting opinion in the *Bush* case. Chief Justice Weygandt, in answering the majority opinion, followed the reasoning of the trial court that:

> A dangerous situation must have been made manifest to plaintiff's decedent by Dennis [second trucker] waving his flashlight in the middle of the road trying to flag the automobile in which Bush [plaintiff's decedent] was riding. Since Crigler's [the driver's] testimony shows that Bush was awake and looking straight ahead the only fair inference that could be drawn is that Bush must have seen the flashlight signal.[14]

The dissenting opinion pointed out that not only was the danger made manifest, and not only did the decedent remain silent, but the final requirement for letting the question of contributory negligence go to the jury was also met; that is, there was time for the passenger to act so as to avoid the collision.[15]

It should be noted that the *Davis* and *Bush* cases appear to stand for the proposition that a passenger has *no duty* reasonably to acquire knowledge of a dangerous situation. On the other hand, the reasoning of the dissent in the *Bush* case seems to be that even if the passenger did not see the flares, flashlight, or warning signals, he *should have* seen them, or so a jury could reasonably have found.

The rationale of the oft repeated statement of the court that it is not necessary for the plaintiff-passenger to "keep remonstrating or interfering with the driver, or instructing the driver as to how the

12. *Id.* at 506, 150 N.E.2d at 484.

13. *Id.* at 503, 150 N.E.2d at 482; *accord,* Augusta v. Paradis, 61 Ohio App. 323, 22 N.E.2d 578 (1939); Smith v. Cushman Motor Delivery Co., 54 Ohio App. 99, 6 N.E.2d 594 (1936); Metzger v. Yellow Taxicab Co., 48 Ohio App. 275, 193 N.E. 75 (1933).

14. Bush v. Harvey Transfer Co., 146 Ohio St. 657, 673-74, 67 N.E.2d 851, 859 (1946) (dissenting opinion).

15. *Id.* at 675, 67 N.E.2d at 860 (dissenting opinion).

machine shall be operated," is that "it is obvious that such interference more often would result in injury than in its prevention. . . ."[16]

However, it seems clear that there is a difference between a passenger exclaiming that there is an obstruction ahead, or that a car is pulling out, and his continually telling the driver to shift gears, move over to the left lane, or turn right because that way is faster. More important, however, is the questionable conclusion that is drawn from such protests or warnings on the part of the passenger — that "it is obvious that such interference more often would result in injury than in its prevention."[17] One should not be misled by the use of the persuasive definition by characterizing such action as "interference." The actions could, with equal justification, be termed "assistance," or "helpfulness."

The court in the *Telling Belle* case does not give any explanation as to how or why such remarks would more often result in injury, and the use of the phrase "it is obvious that . . ." perhaps suggests the weakness of the argument and the difficulty in supporting the conclusion.

It would seem to be equally valid to argue that a suggestion that the driver reduce his speed to the lawful limit would reduce the number of accidents and injuries. It is difficult to imagine exactly how a comment on the excessive speed could in fact "more often result in injury than in its prevention."[18] The driver may not heed the advice of the passenger and injury may not be prevented, but it seems very dubious that the chance of injury would be *increased;* rather, it would seem that in *some* cases the driver would reduce his speed and an accident would be avoided.

The case for requiring the passenger to mention to the driver dangers which he perceives would seem to be even stronger. Everyone who has driven is aware of the fact that with the number of cars on the crowded highways today, it is extremely difficult to be aware of everything that takes place on the road. While the driver is looking in the rear-vision mirror, a car might pull out from a side street on the right side of the road, or a car previously parked might pull away from the curb and into the driving lane. In such a case is it really more probable that the mention of this danger by the passenger will increase the risk of injury, or is it more probable that it will decrease this risk? The passenger's exclamation may not have any effect on the result. But there is a reasonable possibility that such warning *will* avert an accident, and it is virtually impossible to imagine how it would *increase* the likelihood of an accident. This being the case, it seems that it is time to re-examine the philosophy under-

16. Telling Belle Vernon Co. v. Krenz, 34 Ohio App. 499, 505, 171 N.E. 357, 359 (1928); *accord,* Cleveland Ry. v. Heller, 15 Ohio App. 346 (1921).

17. Telling Belle Vernon Co. v. Krenz, *supra* note 16, at 505, 171 N.E. at 359.

18. *Ibid.* This case involved excessive speed.

lying the concept that there is no affirmative duty to protest against excessive speed or to warn the driver of impending dangers.

When the court says that a word of protest or warning on the part of the passenger would only increase the probability of resulting injuries, it not only is ignoring reality, but very often the court is also invading the province of the jury. The role of the jury is to determine first, what the facts are — that is, what portion of the entire evidence they believe to be true — and second, whether, under the judge's instructions as to "the law," the facts reveal a failure to meet the standard of care imposed upon the party so charged. While some cases will justify a court's withholding from the jury the question of contributory negligence, it is submitted that in situations such as the *Bush* and *Davis* cases, reasonable minds could differ as to the facts and as to whether a warning or protest by the plaintiff *could in fact* have averted the accident. This being the case, is it proper for the court to take the issue of contributory negligence from the jury on the basis of the *court's* determination of the fact that such an exclamation could not have altered the course of events?

Instructing the Jury on Contributory Negligence

In view of the limitations imposed upon the submission to the jury of the question of the passenger's contributory negligence, the following vital question arises: if there is evidence of contributory negligence, under what instructions should the issue be submitted to the jury?

At the outset, the problem revolves around the choice of what could be termed a "strict" or a "liberal" charge.[19] Under the "strict" charge, the court sets forth specific duties which are included in the requirement of exercising ordinary care, or it can go further and set forth specific acts, the non-performance of which would constitute contributory negligence. The "liberal" charge, on the other hand, states merely that the law requires the passenger to use ordinary care under the circumstances, and then lets the jury decide both what constitutes ordinary care under the circumstances, *and* whether the plaintiff failed to meet this standard.

The distinction can be better understood by looking at a specific case. In *Hocking Valley Ry. v. Wykle,*[20] the driver of the car in which the plaintiff was a passenger approached a railroad crossing, listened for a train, slowed down, and looked to the right. He looked to the left as he crossed the tracks, saw a flash, and a gondola

19. Mechem, *The Contributory Negligence of Automobile Passengers,* 78 U. Pa. L. Rev. 736 (1930), uses the terms "strict" and "dissenting" to distinguish the two types of charge. However, since the publication of that article many states have adopted what he refers to as the "dissenting" rule. Therefore, it seems more appropriate to use the terms "strict" and "liberal" today.

20. 122 Ohio St. 391, 171 N.E. 860 (1930).

car backing up the tracks from the driver's left collided with the automobile. The defendant requested the trial court to use a "strict" charge. The trial judge refused to instruct that

> it was the duty of the plaintiff to use ordinary care in the exercise of his own facilities in looking and listening for a train as the automobile approached the crossing. . . .
>
> It was the plaintiff's duty to use his senses of sight and hearing to avoid injury to himself when he was about to go upon the grade crossing, which is admittedly a place of danger. The time to use these senses for his own protection was just before going into the zone of danger, and it was the plaintiff's duty to look and listen in such a manner as would make the use of these senses effective.[21]

The court in this case said that it was not error to refuse to submit this charge, because the charge went too far. The court went on to say that while the passenger has the duty of ordinary care, and cannot rely entirely upon the driver, the rule is that

> it is a matter of common knowledge that under ordinary circumstances such occupants do largely rely upon the driver, who has the exclusive control and management of the vehicle, exercising the required degree of care, and for that reason courts are not justified in adopting a hard and fast rule that they are guilty of negligence in doing so.[22]

Thus, it was held that the court should instruct that there is a general duty to use due care and that the passenger cannot rely entirely upon the driver, and no more. To go further in instructing the jury on the duty of the passenger would be error.[23]

The *Davis* case[24] again provides an example of the "liberal" instruction. The trial court charged:

> A passenger is required to use her faculties of sight and hearing for her own protection and at a railroad crossing is required to exercise that care for her own safety which persons of ordinary care and prudence are accustomed to exercise under the same or similar circumstances.[25]

The appellate court held that this charge was not erroneous even though there was no mention of a duty to look for trains, and to exercise her senses of sight and hearing so as to detect the approach of trains. Thus, in this case, the jury was left free to decide, first, whether persons of ordinary care and prudence usually exercise *any* care at railroad crossings when they are automobile passengers. Second, the jury, if they found some care was usually exercised, was free

21. *Id.* at 394-95, 171 N.E. at 861.

22. *Id.* at 396, 171 N.E. at 861-62, quoting with approval Smith v. St. Louis-San Francisco Ry., 321 Mo. 105, 122, 9 S.W.2d 939, 946 (1928).

23. It should be noted that the duty of the passenger and his right to rely on the driver are correlatives. That is, the more a passenger has the right to rely upon the driver, the less is it incumbent upon the passenger to use his own senses to lookout for dangers.

24. Davis v. New York Central R.R., 104 Ohio App. 497, 150 N.E.2d 477 (1957).

25. *Id.* at 504, 150 N.E.2d at 483. It should be remembered that in this case the decedent lived only six hundred feet from the crossing.

to decide what acts constituted due care — to casually glance, look for puffs of smoke, only look for flashing signals, etc. Finally, the jury would decide whether the plaintiff failed to meet the standard of care which they determined a person of ordinary care would have exercised.

It seems settled now that Ohio is committed to the "liberal" charge, which leaves the determination of all factors of due care to the jury and lets it determine whether the passenger-plaintiff failed to meet this standard.[26]

From What Point Should Contributory Negligence Be Tested

After the decision is made regarding the "strict" versus the "liberal" charge, the following question arises: from what point should the possible contributory negligence of the plaintiff be tested? That is, can the plaintiff let herself be put into a position of danger, by not protesting against excessive speed, failing to see an obstruction, etc., and then test the alleged contributory negligence from that point? Or should the contributory negligence be tested from an earlier point in time and circumstance, such that the failure to maintain an outlook or to protest would be included within the acts to be tested by the jury?

The majority and dissenting opinions in the *Bush* case[27] would seem to reveal this distinction, even though it was not expressed in such terms. The majority view was that, since the passenger did not see the second truck driver waving a flashlight, the passenger was unaware of a dangerous situation until such time as the accident could not have been avoided. Therefore, there was no question of contributory negligence to go to the jury. In effect, the court thus held that a passenger can let himself be put in a dangerous situation and then contributory negligence is to be tested from *that* point. In the *Bush* case, since the plaintiff could have done nothing to alter the

26. See Bush v. Harvey Transfer Co., 146 Ohio St. 657, 67 N.E.2d 851 (1946); Hocking Valley Ry. v. Wykle, 122 Ohio St. 391, 171 N.E. 860 (1930); Toledo Ry. & Light Co. v. Mayers, 93 Ohio St. 304, 112 N.E. 1014 (1916); Yost v. Peterson, 101 Ohio App. 203, 138 N.E.2d 311 (1956); Collins v. Pennsylvania R.R., 76 Ohio App. 115, 63 N.E.2d 225 (1944); Langdon v. Cincinnati Street Ry., 75 Ohio App. 482, 62 N.E.2d 380 (1943); Johnson v. Eastern Ohio Transport Corp., 72 Ohio App. 172, 50 N.E.2d 1003 (1942); Metzger v. Yellow Taxicab Co., 48 Ohio App. 275, 193 N.E. 75 (1933); Bailey v. Parker, 34 Ohio App. 207, 170 N.E. 607 (1930).

27. Bush v. Harvey Transfer Co., 146 Ohio St. 657, 67 N.E.2d 851 (1946). The majority and dissenting opinions' discussions of contributory negligence both appeared to be surprisingly sound. Upon examination one found that the reason why diametrically opposed results appeared to be equally logical was that each opinion chose a different point to begin their analysis. The problem posed above could be rephrased in terms of the duty of a passenger to maintain a lookout for dangerous situations which *might* arise. Both opinions, however, avoided a head-on discussion of lookout as such.

course of events after the car passed the second truck driver, no issue of contributory negligence was raised.

The dissenting opinion[28] felt that contributory negligence should be tested from a point prior to the time of imminent collision, and that the passenger has the duty to use his senses to observe impending danger at all points along the path to the collision. Therefore, when, prior to the accident, there was a warning of impending danger, the jury should decide whether the failure to see this warning, or the failure to speak to the driver after seeing the warning, constituted contributory negligence. At that point, there was time to avoid the accident, and the dissenting opinion felt that the jury should pass upon whether the passenger was negligent in failing to perceive the warning or to warn the driver of the same.

The same problem was raised in the case of *Metzger v. Yellow Taxicab Co.*[29] Here the trial court instructed the jury:

> It was also the duty of the plaintiff to have exercised ordinary care for her own safety. It was her duty to have used her faculties of sight and hearing to discover any danger to which she might be exposed and to have used ordinary care to protect herself therefrom.[30]

In this case, the plaintiff and her husband were guests in the car driven by a third person. There was an intersection collision with the defendant, and in a suit for personal injuries the jury returned a verdict for the defendant. The court of appeals reversed and remanded the case on the basis that there was no evidence that the plaintiff was guilty of contributory negligence, because

> . . . the record discloses clearly that Mrs. Metzger [plaintiff] had not been watching Leith [the driver] or paying attention to how he was driving his automobile, there being nothing to attract her attention thereto until the instant of the occurring collision, when it was too late for her to have said or done anything by way of protest or otherwise.[31]

Thus, it was the feeling of the court that contributory negligence should not be tested on a continuing basis. Rather, they said that a passenger can ignore the driving of her host, be carried into a dangerous situation, and *then* the question of contributory negligence arises — after the dangerous situation had been created, did the passenger fail to act as a reasonably cautious person, and would some act have avoided the injury?

There are a few cases that test the contributory negligence from the point at which the plaintiff became a passenger, rather than when the danger was finally made apparent. However, those cases seem to turn on the fact that the plaintiff assumed a dangerous position

28. *Id.* at 673, 67 N.E.2d at 859 (dissenting opinion).
29. 48 Ohio App. 275, 193 N.E. 75 (1933).
30. *Id.* at 276, 193 N.E. at 76.
31. *Id.* at 277, 193 N.E. at 76.

in relation to the vehicle. One case[32] involved a plaintiff riding in the back of a little open trailer, and another[33] dealt with a plaintiff hitching a ride by standing on a step on a tractor. In each of these cases, the court said that if the plaintiff puts himself in such a position that he cannot effectively use his senses of sight and hearing at a railroad crossing, there is contributory negligence. Further, the court held that such negligence is not to be tested from the time at which it became apparent that a collision was imminent. Again, however, the cases seem to turn on the initial carelessness of the plaintiff in assuming his position on the vehicle.[34]

Even the assumption of a dangerous position will not always take the plaintiff outside the rule of testing the contributory negligence after the danger is upon its victim. A pinnacle of this extreme view is the case of *Collins v. Pennsylvania R. R.*[35] In that case the plaintiff was sitting in the middle of the front seat of a coupe, with three other persons. The fifteen-year-old plaintiff had ridden in the car before and knew that the right side window was missing and in its place was a piece of cardboard with three slots cut in it, covered with isinglass. The accident took place as the car was crossing a railroad track, a collision occurring with a train approaching from the right. The trial court directed a verdict for the defendant at the close of the plaintiff's case, on the basis that the plaintiff was contributorily negligent by riding in a car with that type window and on the basis of her testimony that she did not look at all when the car was crossing the railroad track. The court of appeals, in reversing the decision, said that the question of contributory negligence was for the jury since reasonable minds could differ on whether the plaintiff was contributorily negligent by riding in a car from which it was virtually impossible to see to the right, with four people in the front seat, and by failing to make any effort to use her senses to perceive possible danger.

It is a little difficult to reconcile that result with the statement in the opinion that "guests are required to look and listen at railroad crossings."[36] The only way in which this phrase can be reconciled with the facts of the case is by the court's further statement: "and of course warn the driver of approaching trains at crossings known to

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32. Lawrence v. Toledo Terminal R.R., 154 Ohio St. 335, 96 N.E.2d 7 (1950).

33. Tidd v. New York Central R.R., 132 Ohio St. 531, 9 N.E.2d 509 (1937).

34. The rationale of these cases, that there is a question of contributory negligence because the plaintiff voluntarily placed himself in a dangerous situation by his physical position, raises the question of whether there is a truly valid distinction between that type case and the situation where the plaintiff places himself in a dangerous position by paying no attention to the road.

35. 76 Ohio App. 115, 63 N.E.2d 225 (1944).

36. *Id.* at 118, 63 N.E.2d at 228.

and perceivable by them. . . ."[37] The last phrase, warning the driver of approaching trains *known* to the plaintiff, again leaves an out for the plaintiff and is a further example of testing the contributory negligence of the plaintiff only from the point after the dangerous situation has been created, not before.[38]

Presumption of "Due Care" and Burden of Proof

Having noted that the courts are reluctant to let the issue of contributory negligence go to the jury, that the Ohio courts usually use the "liberal" rule in their charge when the question is given to the jury, and that in most cases, contributory negligence is tested from the point after the emergency situation has been created, the further obstacles of the burden of proof and presumptions are often insurmountably encountered where the defense of contributory negligence has not yet been eliminated.

There is no question but that the burden of proving contributory negligence is on the defendant. Further, it is now established in Ohio that there is a presumption that the passenger acted as a person of ordinary care and prudence would have acted under the circumstances.[39] Remembering that the courts generally hold that the passenger is under the duty to communicate to the driver only those dangers actually perceived by the passenger, a denial on the part of the plaintiff that he saw the warning or the obstruction, in the absence of other affirmative evidence, means that the defendant failed to carry the burden of proof, or that the defendant failed to overcome the presumption.[40] The situation of the defendant becomes especially difficult in the case where the passenger was killed as a result of the accident, and is virtually impossible if both the driver and passenger were killed. In such a case, there is no escape for the defendant, so that if *any* negligence on the part of the defendant can be found, he is liable.[41]

Unwarranted Distinctions in Contributory Negligence

Looking at the role of contributory negligence in the trial of personal injury suits by passengers, it has been suggested that a distinc-

37. *Ibid.* Although the word "known" as used in this passage would seem to refer to "crossings," when reading the entire opinion it is apparent that "known" refers to "trains."

38. See Pennsylvania R.R. v. Lindahl, 111 Ohio St. 502, 146 N.E. 71 (1924).

39. Bush v. Harvey Transfer Co., 146 Ohio St. 657, 669-70, 67 N.E.2d 851, 857-58 (1946). PROSSER, TORTS 198, n. 59 (2d ed. 1955), states that this presumption is merely another way of saying that the burden of proof is on the defendant. While this may be correct in legal theory, the practical effect upon the jury may differ when instructed that "there is a presumption that the plaintiff acted as a person of ordinary care would have acted," rather than being instructed that "the burden of proving contributory negligence is on the defendant." It would seem that the former, a "presumption" cloaked with the aura of the bench, would be more difficult for the defendant to overcome.

40. See Bush v. Harvey Transfer Co., *supra* note 39.

41. Davis v. New York Central R.R., 104 Ohio App. 497, 150 N.E.2d 477 (1957).

tion seems to exist in the standard of care required of the passenger depending upon who the defendant is. For example, when the passenger is suing the driver of the vehicle in which he was riding, the courts have been more willing to use the "strict" rule in charging the jury as to the duty of the passenger. At the same time, the courts seem to feel that when the suit is against a third person, the standard of conduct required of the plaintiff to escape the bar of contributory negligence should be reduced. And when the defendant happens to be a railroad, a further drop in the standard is noticed.[42]

In legal theory such a distinction is unjustifiable. However, an unspoken feeling that it is unfair to subject to a lawsuit the driver of the car in which the plaintiff was riding, when the plaintiff often has an opportunity to see the danger approaching, seems to be the underlying reason for this distinction. To some degree the anomaly has been extinguished by the guest statute. However, the loop-holes in this statute are sufficient to provide the court with a number of cases in which the plaintiff is suing the driver of the vehicle in which he was a passenger. To the extent that the practice of a double standard does exist, it seems highly reprehensible since the duty of the passenger is the same — to use ordinary care to protect himself from injury — regardless of who the defendant may be.

It seems that the courts have been very liberal in determining what constitutes ordinary care in the railroad cases. It is difficult to say whether this results from a predisposition as to what result should be obtained in such a case, a feeling that railroads operate dangerous instrumentalities so that the court should not be as strict in defining the duty of the passenger, or the argument that since railroad crossings are dangerous a driver is usually more cautious, and the passenger is, therefore, entitled to rely more heavily upon the driver in such a case — the correlative being that the passenger's duty is narrowed. The courts have not made known the basis for this apparent distinction in railroad crossing cases, but the results of their decisions seem to bear witness to the fact that it exists. In the absence of a statute imposing a heavier duty upon a railroad, the distinction seems unjustified.

Indeed, it would seem that a passenger, even a minor, is aware of the fact that care must be used in crossing railroad tracks because of the speed and confined line of travel of trains. If anything, this potential danger area would seem to be apparent to an ordinarily cautious person, thereby suggesting the need for a greater degree of caution in order to measure up to the standard of the "reasonably cautious person."

In the same vein, intersections would seem to suggest to an ordinarily cautious passenger that he is entering an area of increased

42. Mechem, *supra* note 19, at 746, n. 18.

danger, and one in which it is more difficult for the driver to notice every physical happening. If this is accepted, then it should logically follow that the passenger should take a more active part as a lookout, should mention the excessive speed to the driver, and should warn the driver of cars, other vehicles, or obstructions seen by the passenger.

Finally, in regard to the varying concept of what constitutes reasonable care on the part of a passenger, consideration must be given to the "back-seat driver" concept. Looking more closely at the role of social custom in setting the standard of conduct for the passenger, there is undoubtedly a feeling that "the average guest will . . . feel constrained to run some risk of loss or damage rather than the risk of offending the host by interfering or expressing dissatisfaction with his conduct."[43] It is difficult to deny that this is a factor in the jury's determination of what constitutes reasonable conduct on the part of the plaintiff. This would seem to be especially true in cases where the court, using the liberal charge, leaves the entire determination of the standard of conduct to the jury. One writer, urging the inclusion of this factor in determining the standard, said:

> It is the proper function of the law of negligence to recognize a standard of conduct that is in harmony with existing social conditions, which means that all social factors must be weighed in finding that standard. If this custom or inhibition is a factor in the conduct of society, then its value should not be overlooked in determining what is reasonable conduct for persons coming under its influence.[44]

While this custom can hardly be excluded from the jury's consideration in deliberating over the question of contributory negligence, regardless of how strict the instructions may have been, it would seem that the custom receives undue emphasis when the entire matter of setting and applying the standard of a reasonably cautious person is left completely to the jury. If there is no instruction that a person must use his senses of sight and hearing as a reasonably cautious person would do under the circumstances, that a passenger cannot rely entirely upon the driver, or that the plaintiff is not absolved of all duties merely because he is a passenger, then the primary consideration in testing the standard of conduct required of the plaintiff would seem to be that of the inhibiting social custom discussed above, because that custom is what the average person will usually think of first (or entirely) when questioned as to what conduct should be expected of a passenger in a case of excessive speed, or a car pulling out from a side street.

A further objection to the blind recognition of the custom is that, by definition, it negates the presumption recognized by the courts that a passenger used the care of an ordinarily prudent person in

43. *Id.* at 744.

44. *Id.* at 744-45.

order to avoid injury to himself. If "it is a matter of common knowledge that there are certain social customs which are generally observed *even at the risk of personal loss,*"[45] (emphasis added) how can it be said that there is also a presumption that a person acted as a reasonably prudent person to protect himself from injury. If the instinct for self-preservation, which is the basis of the presumption, is so strong as to allow the courts to indulge in a presumption, how can it also be said that it is "reasonable conduct" to abstain from acting in a manner calculated to prevent injury, when testing the duty of the plaintiff-passenger?

It is no answer that the presumption is only to the effect that the passenger acted in a "reasonably prudent" manner to avoid injury to himself. It seems neither "reasonable" nor "prudent" for a human to sit silently by and watch himself be carried into a position of danger merely because there is an unwritten rule of social etiquette that it is better to risk the loss of a limb than to offend a driver by suggesting that he not drive eighty miles an hour in a fifty-mile-an-hour zone. If that be reasonable conduct, on what basis can a person leaving a truck one foot onto the pavement of a highway twenty feet wide, with a fuzee on the rear end of the truck, be considered unreasonable?[46]

Time to Re-Examine Contributory Negligence

Few will argue the point that the defense of contributory negligence is generally held in disfavor by the courts.[47] The primary reason assigned for this attitude is that the doctrine is too harsh, in that it bars the plaintiff's recovery even though his negligence be slight compared to that of the defendant. In addition, it is felt in some quarters that the defendant usually is insured, or is a large corporation, thereby rendering the defendant better able to bear the burden of financing the cost of the accident. Regardless of the merits of these reasons, the fact remains that there exists a nice general rule of law that has been all but destroyed by the exceptions, interpretations, and applications of the rule to specific cases. As noted in this article, many guises used to avoid the application of this defense are not well founded.

The result of this is that a well established rule of law has been relegated to playing two minor roles: first, as a bar to recovery in cases of *clear* contributory negligence on the part of the passenger;[48] and, second, as an illicit method used by the jury to "compare negligence." It is urged that the defense of contributory negligence does

45. *Id.* at 744.

46. Bush v. Harvey Transfer Co., 146 Ohio St. 657, 67 N.E.2d 851 (1946).

47. James, *Contributory Negligence,* 62 YALE L.J. 691, 704-05 (1953).

48. See notes 32-34 *supra* and accompanying text. *Accord,* Black v. City of Berea, 137 Ohio St. 611 (1941).